No. 15388.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANASTASIO LAWRENCE AMAYA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of Jurisdiction.

Appellant and co-defendant Dan Casias were indicted by the Grand Jury for the Southern District of California on August 22, 1956, on one count of assaulting a federal officer. [Clk. T. 1.][1]

On August 28, 1956, the defendants entered a plea of not guilty to the indictment. [Clk. T. 17.] Jury trial began the same day in the United States District Court for the Southern District of California, the Honorable Thurmond Clarke, presiding. [*Ibid.*] The trial was concluded by a verdict of guilty as to each defendant on August 30, 1956. [Clk. T. 2.]

On September 24, 1956, it was adjudged that appellant be committed to the custody of the Attorney General for a period of one year. [Clk. T. 12.]

On September 27, 1956, a timely notice of appeal was filed. [Clk. T. 14-15.]

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[1]Clk. T. refers to the Clerk's Transcript of Record.

The District Court had jurisdiction of this action under United States Code, Title 18, Section 111.

This Court has jurisdiction under the provisions of United States Code, Title 28, Section 1291, and Rules 37 and 39 of the Federal Rules of Criminal Procedure, United States Code Annotated, Title 18.

Statement of the Case.

On May 14, 1956, Investigator William Sherrill of the Immigration and Naturalization Service, advised his superiors that an informant had told him three aliens illegally in the United States frequented the La Chiquita bar in Pico, California. [R. 12, 18.][2] Sherrill's supervisor assigned the case to him and told him to take home a Government vehicle in connection therewith during the period May 16, 17 and 18, 1956. [R. 12-13, 19.] Sherrill was ordered to be ready to actively work the case should further information relating to the identity of the aliens be forthcoming. [R. 12.]

On May 18, 1956, a Sunday, at approximately 6:00 P. M., the informant came to Sherrill's home, reported that one of the aliens mentioned was then at the La Chiquita, and gave a description of the purported alien. [R. 19, 20.] After making arrangements to book any prisoners he might take, Sherrill returned home to obtain his gun and handcuffs, and then proceeded to the bar to ascertain whether in fact the person in the bar was an alien illegally in the United States. [R. 19-21, 39.]

After entering the bar, Sherrill identified himself to various patrons seated at the bar, exhibiting his badge and

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[2]R. will refer to the Reporter's Transcript, contained in the Transcript of Record.

stating that he was an immigration officer, and requested that they state their place of birth. [R. 21.] One of the persons so spoken to was the appellant. [R. 23, 41-42.]

After questioning politely [R. 130] four or five persons, the officer noticed a man edging toward the front door of the bar who answered the description that the informant had provided. [R. 23.] Sherrill stopped him, stated that he was an immigration officer, exhibited his credentials, and asked his place of birth. [R. 23-24.] After receiving a non-responsive answer, Investigator Sherrill repeated his question. [R. 24.]

At that moment, someone pinned his arms behind him and spun him around to where appellant was then standing. [R. 24.] Sherrill was repeatedly struck by appellant and others in the face, neck and chest while so pinioned. [R. 24-25.] After succeeding in freeing a hand and drawing his revolver, which had been in his pants pocket, his assailants scattered, and Sherrill chased appellant into the rear storeroom. [R. 25.] At Sherrill's order, appellant dropped a beer bottle which he had unsuccessfully attempted to turn into a cutting instrument. One of appellant's wrists was handcuffed, the officer holding the other cuff by his hand. [R. 25, 74.]

After the two re-entered the bar, the officer attempted to handcuff appellant to another person who had struck him, whereupon co-defendant Casias grabbed him from the rear, and, with others, twisted the gun from the officer's hand, tearing the flesh of Sherrill's thumb. [R. 25-26. 109.] After being kicked while on the floor, Sherrill was molested no further after he complied with the request of half a dozen or so belligerants to remove the handcuffs from appellant's wrist. [R. 26-27.] His gun was kept from him and hidden. [R. 46, 218.]

ARGUMENT.

I.

The Assaulted Officer Was Engaged in the Performance of His Official Duties.

A. Inquiry as to Probable Cause for Arrest Is Irrelevant Where No Arrest Takes Place.

Appellant's first argument is that the immigration officer was not engaged in the performance of his official duties at the time the offense took place because there were insufficient grounds for arresting the purported alien. Whatever merit this point might have under different factual circumstances, its advancement here avails appellant nothing since the supposedly illegal arrest never occurred. At the time the officer was attacked by appellant and others, an arrest, legal or otherwise, was not taking place. All that Officer Sherrill had done, up to the point of appellant's assault, was to stop and question a person evidently anxious to leave premises in which an announced immigration official was inquiring as to the citizenship of the occupants. No arrest having been made, it is pointless to conjecture what would have happened had the attack not taken place, for *at the time of appellant's offense,* the officer was lawfully performing his duties respecting the enforcement of immigration laws.

Arguments identical to that of the appellant have been made in other recent appellate cases, and have been disposed of summarily.

In *Carter v. United States,* 231 F. 2d 232 (C. A. 5, 1956), cert. den. 76 S. Ct. 1052, Internal Revenue Agents were conducting a search of a bar when Agent Poe noticed the defendant's car approach the bar and stop. Poe went to it, identified himself as a federal agent to its occupants,

opened the car door and started to enter it when the automobile was accelerated, reaching a speed of 60 m.p.h., thereby obstructing and interfering with Poe who was hanging precariously half in and half out of the car. On page 236, it was stated:

> "The remaining complaints have no substance. As an arrest or an attempted arrest at the time Poe first came up to the car was not made, the legality of Poe's or Ponto's actions are in no way affected by the legality or illegality of an arrest which did not take place."

Hall v. United States, 235 F. 2d 248 (C. A. 5, 1956), involved Revenue Agents searching for a fugitive named Parsons. They approached the front of Parson's residence where they saw defendant Hall in a disheveled condition. Upon seeing the agents, the defendant started to depart whereupon the agents called to him to wait, that they wanted to talk to him. They identified themselves as federal officers and a gold badge was in defendant's plain view. Defendant then attempted to draw a pistol from his pocket. A later scuffle ensued which resulted in the charge of a violation of 18 U. S. C. §111. The Court stated:

> "The contention of appellant that the officers had no right to arrest him is without basis as no arrest was attempted at the time the officers first approached Hall."

Cf. Hall v. United States, 222 F. 2d 107 (C. A. 4, 1955), also involving a violation of 18 U. S. C. §111:

> "Questions have been raised as to the right of the officers to seize without warrant an automobile not at the time engaged in violation of the law on the basis of information received as to prior violations; but we need not go into these questions . . . Whether they

would have had a right to seize it without warrant or not, they were unquestionably acting in the discharge of their duty in taking it into possession with the acquiesence of the owner, and appellants had no right to interfere with them. When they did so forcibly, they were guilty of a violation of the statute."

Moreover, there is authority to the effect that even though an agent exceeds the lawful bounds of his office while carrying out an official investigation, the officer nevertheless will be considered to have been engaged in the official performance of his duties within the meaning of a statute penalizing his assault or murder. In *Arwood v. United States,* 134 F. 2d 1007 (C. C. A. 6, 1943), the defendant was convicted of the murder of an Internal Revenue Agent in violation of 18 U. S. C. §253, predecessor statute to 18 U. S. C. §1111, which provided punishment for the killing of a federal officer "while engaged in the performance of his official duties, or on account of the performance of his official duties." Identical language is contained in 18 U. S. C. §111. The Opinion reads, at pages 1010-1011:

"It is uncontroverted that the deceased and his associates . . . were Investigators of the Alcohol Tax Unit, and hence were officers, employees and agents in the service of the Internal Revenue. Further, it is clear that . . . these officers were making investigations. . . . as was their duty . . . They were so engaged when the deceased was killed; and appellant knew who they were and what they were doing.

"Appellant takes a different view of the probative effect of the evidence. He contends that they were not engaged in the performance of their official duties but were making an unlawful invasion of his home,

and an unreasonable search, prohibited by the Fourth Amendment, and that therefore the statute under which he was indicted afforded the deceased no protection.

"We cannot accept this view. *We need not determine whether the deceased and his associates were unlawfully invading appellant's home or were engaged in an unreasonable search.* However pertinent that inquiry might become in a prosecution of appellant for the operation of unregistered distillery, it is not necessary to decision here. The fact remains that the entry of the deceased into the house or upon the premises and any search made there was in the course of the investigation and germane to the performance of the duties of the officers while bona fide acting under the color of authority . . .

"We think the motion for a directed verdict was correctly overruled." (Emphasis added.)

B. The Officer's Entry Into the La Chiquita Was in the Proper Performance of His Official Duties.

At page 16 of his brief, appellant recognizes that no arrest took place in the instant case. This defect is said to be overcome, however, by the fact that Officer Sherrill's objective, purpose and intent was illegal and thus this subjective illegality colors his entire mission at the La Chiquita bar. Although it might be interesting to do so, it seems wholly unnecessary to debate whether, from the very moment he decided to arrest the alien, Sherrill was no longer engaged in the performance of his official duties, even though the arrest never occurred. The premise upon which this unique contention is based is that the officer intended to make an arrest on an uncorroborated tip without sufficient reason to believe the guilt of the person to be arrested. The evidence in the case provides no basis

for the assumption that, *as a matter of law,* such was the intent of the officer. Ignored by appellant is Sherrill's testimony during cross-examination on this very point.

> "Q. In fact, you probably would have arrested anyone who bore this name or description or at least description of such person you were looking for; isn't that true? A. I wouldnt' have arrested anyone. I would have just ascertained whether he was an alien illegally in the United States, and I am competent to do so."

This testimony is evidence of the fact that no illegal objective was in the officer's mind, since if Sherrill had "ascertained," as he had intended to do, that an alien was illegally in the United States, obviously he would have had sufficient reason so to believe.

Appellant never explains just what would have been the reasonable and proper thing for the officer to do. According to appellant's contention, the uncorroborated tip of an informer does not justify an arrest of an alien without a warrant. By the same token, such a tip would seem to be insufficient grounds for a determination that a *prima facie* case for deportation existed, the criterion upon which immigration warrants can be obtained.[3] Therefore, in order to perform his duties of investigating this case, as he had been ordered to do, what course could Sherrill have taken but to proceed to the La Chiquita and ascertain the facts? Once at the bar, Sherrill could have questioned the suspect and might have corroborated the tip, or uncovered grounds such as an admission which alone would have been sufficient to justify the arrest. But those grounds

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[3]Immigration and Naturalization Service Regulation 242.1, Appendix, Appellant's Brief.

could not have been discovered had not the officer entered the bar. Thus the entry was not only the perfectly proper and logical thing to do, but also clearly was the lawful performance of the officer's duty.

Appellant makes a further contention as to the fact that Sherrill had no belief that the alien was likely to escape before a warrant could be obtained, again making his actions illegal and outside the scope of his duties. Again applicable is the counter-argument that no arrest took place, and that, therefore, such a contention is quite irrelevant. Also, as stated above, Sherrill could not have obtained a warrant on the sole basis of an informer's tip; even had that been possible, appellant does not tell us how it could have been obtained from the appropriate immigration officers[4] on a Sunday evening, when there is no one in the offices of the Immigration Service. [R. 40.] Therefore, appellant's emphasis upon the lapse of time between the informer's visit and Sherrill's entry into the bar is pointless, as no warrant could have been procured during that period of time. The only way to have secured a warrant, would have been for the officer to question the alien on the Sunday in question, ascertain his illegal status, get his address, if possible, and report the facts to the appropriate officers the following day. It would be a strange alien, indeed, who would remain available for the service of such a warrant.

Much stress has been laid by appellant upon the case of *United States v. Coplon,* 185 F. 2d (C. A. 2, 1950), the case having been cited seven times in his brief. In that case it was held by the Court of Appeals for the Second Circuit that the arrest therein was invalid since there was

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[4]Regulation 242.1, 242.12, Appendix, Appellant's Brief.

no basis for a finding that F. B. I. agents had had reason to believe defendant Coplon would escape before a warrant could have been obtained. Some of the facts in connection therewith were that Coplon was an employee of the Department of Justice, and her whereabouts and address were at all times known to the F. B. I. which had a total of twenty-four agents assigned to trail her. Furthermore, it was essential to the successful continuance of Coplon's criminal conduct that she retain her position with the Department of Justice. Under these circumstances, the appellate court ruled as a matter of law that there was no emergency justifying an arrest without a warrant. Any attempt to analogize the Coplon facts to the instant situation would be absurd.

C. Interrogation of the Alien Was a Proper Performance of the Officer's Duties.

Appellant also complains of Sherrill's "arbitrary and capricious police activity" in questioning the jovial, peace-loving patrons of the La Chiquita. At the time the assault took place, the officer was questioning a person who had edged away from the bar towards the exit. In view of Sherrill's previous open announcement of his status as an immigration official, the suspect's movements toward the door alone would give him a just reason to inquire as to his nationality. Whether this person was under a duty to reply or not, the officer clearly was not acting outside the scope of his duty by inquiring. It is impossible to see any justification under the circumstances for the alien to have assaulted Sherrill; appellant Amaya certainly stands in no better position. The opinions of *Carter v. United States,* 213 F. 2d 232 (C. A. 5, 1956), and *Hall v. United States,* 235 F. 2d 248 (C. A. 5, 1956), contain peculiarly

appropriate language with respect to this aspect. *Carter v. United States, supra,* p. 235, reads:

> "Nor is this to be viewed as though agent Poe was intent only on a search and subsequent arrest if he found evidence of likely guilt. Poe's function is not so limited. Whatever might, for example, have been Ponto's duty to answer, Poe undoubtedly had the right to ask questions. Ponto could not run him down to keep this from happening."

Hall v. United States, supra, pages 248-249, reads:

> "Appellant contends there is no evidence that the officers had a right to stop and question him or to arrest him . . .
>
> "At the time of the encounter the officers were engaged in their official duties . . . Seeing the condition of Hall and his waiting automobile, they had sufficient grounds to stop and question him, as well as the right to do so. . . . Hall was under no duty to answer, but in refusing to answer he had no right to resort to the attempted use of firearms."

II.

Refusal to Disclose the Identity of the Informant Was Proper Since Disclosure Was Not Material to the Defense of the Accused.

Appellant's second major contention is that the trial court erred in refusing to allow the identity of the informer be revealed upon cross-examination of Officer Sherrill. Appellant reasons that the Government could not show that Sherrill was engaged in the performance of his official duties without showing that "the officer acted upon probable cause in entering the La Chiquita Cafe [and that the] fact of probable cause was in turn wholly dependent upon the existence and reliability of the in-

former, and the substantiality and nature of what he had to say." This argument assumes that the officer needed "probable cause" for entering a public cafe, but this Court held to the contrary in *McWalters v. United States,* 6 F. 2d 224 (C. C. A. 9, 1925):

> "But as the uncontradicted evidence was that the place was a soft drink parlor, open to the public, the agents had a right to enter . . ."

It is true that the law requires the Government to elect between dismissing its prosecution and disclosing the identity of the informer where such disclosure is necessary to a proper defense of an action. The rationale of holdings to such effect was explained in the case of *Roviaro v. United States* ..... U. S. ..... (decided March 25, 1957):

> "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way . . .
>
> "Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.
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> * * * * * * * *
>
> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the par-

ticular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

The Supreme Court determined that the circumstances of the *Roviaro* case demonstrated that the informer's testimony was highly relevant since the informant had taken a material part in bringing about the possession of the narcotic drugs in question and had been present with the accused at the occurrence of the alleged offense. In the instant case, however, not the slightest reason exists for disclosure of the informant, since no justification of, or probable cause for the entry of the officer into the public place is needed. Nor is justification for the interrogation needed, for at the very moment of the instant assault, Sherrill was questioning a person to whom Sherrill's attention had been directed by said person's furtive efforts to leave the La Chiquita, in which bar Sherrill previously had announced his identity and expressed his desire to inquire into the nationality of the patrons. Under such circumstances alone, the officer had sufficient reason to inquire into said person's nationality.

Where no purpose is served by disclosing the identity of an informant, the courts have forbade such disclosure, because "To inform is a statutory duty, and sound public policy forbids exposing informers to possible, even probable evil consequences." (*McInes v. United States,* 62 F. 2d 180 (C. C. A. 9, 1932):

Scher v. United States, 305 U. S. 251, 254 (1938):

> "At the trial, counsel undertook to question the arresting officers relative to the source of information which led them to observe petitioner's actions."

* * * * * * * *

> "In the circumstances the source of the information which caused him to be observed was unimportant to petitioner's defense. The legality of the officer's action does not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence. Justification is not sought because of honest belief based upon credible information. . . ."

Sorrentino v. United States, 163 F. 2d 627, 628-629 (C. C. A. 9, 1947):

> "If the person whom Grady called an informer was an informer and nothing more, appellant would not have been entitled to have his identity disclosed."

Smith v. United States, 9 F. 2d 386, 387 (C. C. A. 9, 1925):

> "The government's evidence tended to show that the defendants were arrested as they were endeavoring to land liquor . . . [A] federal prohibition agent . . . testified on cross-examination that he and his associates had information that defendants were to land liquor at the time and place of the arrest. Counsel for defendants then asked: 'Where did you get that information?' The court sustained the government's objection to this testimony . . . The ruling was correct. The testimony sought would have had no tendency to prove either the guilt or innocence of defendants."

Disclosure of the informant in the instant case would have served only to jeopardize his life or limb, and would not have been material to the defense of the case. Under such circumstances, the trial court did not err in refusing to allow disclosure.

Conclusion.

Much has been said in Appellant's brief concerning the lawlessness of the immigration officer and the right of the patrons of the La Chiquita to be free from unnecessary molestation and annoyance by over-zealous policemen. The evidence in the case, at least that which had to be believed by the jury in order for the appellant to have been found guilty, demonstrates that the officer peacefully was doing his duty when he was brutally attacked by a number of said patrons, including the appellant who had spent much of that Sunday afternoon drinking in three different bars. [R. 169.] It approaches the fantastic to contend that the officer and not the appellant was the lawbreaker.

It cannot be said that, as a matter of law, the officer was not engaged in performance of his official duties at the time appellant's attack occurred. As to the non-disclosure of the informant, such was not necessary under the "balancing the public interest" test so recently laid down by the Supreme Court. Therefore, the judgment of the District Court should be affirmed.

Respectfully submitted,

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